



FOUNDATION for CALIFORNIA
COMMUNITY COLLEGES

MASTER AGREEMENT

Between

FOUNDATION FOR CALIFORNIA COMMUNITY COLLEGES

And

AUTOMOTIVE DEALERSHIP

THE HIGH EMITTER REPLACE OR SCRAP 2 PROGRAM (HEROS2)

Background

The Foundation for California Community Colleges (“Foundation”) has been contracted by the South Coast Air Quality Management District (“South Coast AQMD”) to operate a vehicle emissions reduction program entitled “High Emitter Replace or Scrap 2” (“the HEROS2 Program”). The HEROS2 Program is designed to retire and/or replace high-emitting vehicles to improve air quality and/or provide a fuel efficiency benefit for California motorists.

This Agreement is entered into by the Foundation and the Automotive Dealership identified in Section 17.9 (Notices) (“Dealer”) to enable Dealer to participate in the HEROS2 Program by providing base incentives or low-income incentives (collectively, “Incentives”) to eligible consumers and performing related services towards the retirement of an eligible trade-in vehicle and purchase of an eligible replacement vehicle.

Eligible replacement vehicles (“Eligible Replacement Vehicles”), eligible trade-in vehicles (“Eligible Trade-In Vehicles”) and eligible consumers (“Eligible Consumers”) are determined at Foundation’s sole discretion, based on the HEROS2 Program Consumer Eligibility Guidelines, which will be provided to Dealer and made available via the HEROS2 Program website, www.HEROS2.org. Eligible Trade-In Vehicles must be retired by an eligible vehicle dismantler (“Eligible Dismantler”). A list of Eligible Dismantlers will be made available at www.HEROS2.org.

Agreement

1 **Term** This Agreement is effective upon the date fully executed by all parties (“Effective Date”) and shall extend until August 31, 2013, or until the HEROS2 Program contract funds run out, whichever

occurs first, at which time this Agreement will automatically terminate. Any extension to this Agreement must be in writing and be signed by authorized representatives of both Foundation and Dealer. The document retention and indemnification sections of this Agreement shall remain in effect until the expiration of the Retention Period as defined in Section 10 (Records and Audits).

2. Incorporation by Reference The HEROS2 Program Automotive Dealership Operations Manual – South Coast Air District (“HEROS2 Dealer Manual”) describes the process and procedures that an eligible Dealer must follow in order to participate in the HEROS2 Program. The HEROS2 Dealer Manual in its entirety is herein incorporated by reference and made available at www.HEROS2.org. Foundation retains, in its sole discretion, the right to modify, revise, and/or otherwise update the HEROS2 Dealer Manual, all eligibility criteria, and any other policy or procedure as Foundation deems necessary in order to accomplish meaningful vehicle emissions reductions, to comply with terms required by the South Coast AQMD and/or California Bureau of Automotive Repair, or for any other reason determined at Foundation’s sole discretion. Dealer hereby agrees to be bound by all terms and conditions set forth in the most current version of the HEROS2 Dealer Manual made available at www.HEROS2.org.

3. Dealer Services and Consideration Dealer agrees to, in connection with the terms and conditions of this Agreement, perform all processes and procedures set forth in the HEROS2 Dealer Manual, and to provide Incentives and all related services to Eligible Consumers who retire Eligible Trade-In Vehicles and purchase Eligible Replacement Vehicles (collectively “Services”). In exchange for Services rendered in full compliance with this Agreement and the HEROS2 Dealer Manual, Foundation will reimburse Dealer for its Services and Incentives provided to Eligible Consumers as described in the HEROS2 Dealer Manual.

4. Dealer Eligibility In order to become an Eligible Dealer, Dealer must comply with the Dealer eligibility requirements detailed in the HEROS2 Dealer Manual. Dealer may not perform any Services, including, but not limited to the promotion of the HEROS2 Program, until the Foundation authorizes Dealer as a HEROS2 Eligible Dealer.

5. Dealer Responsibilities The parties acknowledge that Dealer must, as material terms of this Agreement, comply with all of the Dealer Responsibilities set forth in the HEROS2 Dealer Manual.

6. No Guarantee of Eligible Trade-In Vehicle Volume Funding for Incentives will be limited to approximately 5,000 vehicles in the South Coast Air Basin. Consumers will be required to submit a completed a consumer application, and all consumer applications must be validated in order for a consumer to be deemed eligible to participate. To ensure the HEROS2 Program does not become over-subscribed, the Foundation will approve Consumer Applications at Foundation’s sole discretion based on Consumer Eligibility Guidelines and “first qualified – first eligible.” Foundation cannot guarantee that Dealer will be able to attract a minimum number of consumers with Eligible Trade-In Vehicles or successfully negotiate a minimum number of fair-trade sales of Eligible Replacement Vehicles. Demand for Incentives at any particular Dealer location depends on several factors, some outside the control of the HEROS2 Program, including, but not limited to, overall consumer demand. Foundation will, at its sole discretion, contract with other automotive dealerships to provide Services similar to those described in this Agreement.

7. **Marketing** If requested by Foundation, Dealer may not create, market, or distribute to the public materials describing the HEROS2 Program unless provided by Foundation to Dealer or unless Dealer obtains Foundation written approval of the materials in advance of dissemination.

8. Termination

8.1 **Program Funding Contingency** If funding for the HEROS2 Program or any of its component parts is reduced, suspended, terminated, discontinued, or fully expended for any reason, Foundation shall have the option of terminating this Agreement or invoking Foundation's right to issue an order to stop work pursuant to Section 9 (Stop Work Notice) with no liability occurring to Foundation.

8.2 **Termination for Convenience** Foundation has the right to terminate this Agreement for any reason, without penalty, at any time, by providing Dealer with written notice of termination. Dealer has the right to terminate this Agreement for any reason, at any time, by providing Foundation with written notice of the termination at least thirty (30) days in advance.

8.3 **Termination for Cause** Either Foundation or Dealer may terminate this Agreement if the other party breaches any material term or condition of this Agreement and fails to cure such breach within thirty (30) days after written notice of same is sent to the other party or within any other time period agreed upon, in writing, by the Parties.

Subject to the foregoing, Foundation may terminate this Agreement for cause, at any time, by providing Dealer with written notice of the termination if, in Foundation's sole discretion: (1) Dealer ceases to be properly licensed as required by any federal, state, or local law or regulation; (2) Dealer fails to maintain an active email account or other contact information by which Foundation may communicate with authorized representatives of Dealer, or Dealer ceases or fails to communicate with Foundation; (3) Dealer enters bankruptcy or otherwise ceases operations; (4) Dealer fails to maintain the requisite insurance or provide Foundation with proof of requisite insurance and/or additional insured certificates; (5) Dealer's personnel make false or misleading statements to consumers regarding the HEROS2 Program, including, but not limited to, statements concerning consumer eligibility, or exclude, refuse, or discourage consumers from participating in any portion of the HEROS2 Program; (6) Dealer fails to implement or follow processes and procedures as identified in this Agreement and the most current version of the HEROS2 Dealer Manual; (7) Dealer fails to allow HEROS2 Program Manager, Program staff, or his/her designated agent on-site access to HEROS2 Program documents and records and/or HEROS2 Program vehicles stored on the Dealer facility in connection with Section 10 (Records and Audits).

Dealer must cease work immediately upon receiving notice of termination of this Agreement from Foundation, or as required by the written notice, and take all steps possible to mitigate losses. Foundation shall only be liable to Dealer for reimbursement of the applicable Incentives provided to Eligible Consumers in cases where all Services are fully rendered in full compliance with this Agreement and the HEROS2 Dealer Manual, up to and until the effective date of the termination or as otherwise identified, in writing, by Foundation. Dealer hereby waives any other claim for damages, including, but not limited to, damages claims for lost profits, liquidated damages, consequential, incidental, indirect, special, or punitive damages arising from Foundation's termination of this Agreement. Under no circumstances will

Foundation be liable for lost profits, liquidated damages, consequential, incidental, indirect, special, or punitive damages, even if notification has been given as to the possibility of such damages.

9. Stop Work Notice Foundation reserves the right to issue an order to stop work in the event that: (1) a dispute should arise regarding the Services of Dealer (2) funding for the HEROS2 Program or any of its component parts is reduced, suspended, terminated, discontinued, or fully expended for any reason (3) Dealer submits a notice of termination to Foundation. The stop work order will be in effect until the dispute has been resolved or as otherwise agreed to by Foundation.

10. Records and Audits Dealer will keep separate and maintain programmatic records pertaining to the HEROS2 Program for a period of at least five years after the last invoices are paid by Foundation (“Retention Period”). Dealer agrees that Foundation shall have the right to review and to perform any and all inspections and audits the Foundation deems necessary, in Foundation’s sole discretion. Dealer agrees that Foundation has the right to visit Dealer’s premises at any time during normal business hours, both scheduled and unscheduled, and to review, audit, and copy any records and supporting documentation pertaining to the performance of Services under this Agreement. In addition, Dealer agrees to allow Foundation personnel access to Dealer personnel and Eligible Trade-In Vehicles for an on-site inspection of Eligible Trade-In Vehicles at any time while the Eligible Trade-In Vehicle remains on the premises. Dealer agrees to fully cooperate with Foundation concerning any aspect of Foundation’s inspection and auditing procedures and to allow Foundation to interview any employees who might reasonably have information regarding records and/or Services related to this Agreement. This audit provision is deemed material to the formation of this Agreement. This document retention provision applies to, but is not limited to, the following records:

- i. Copy of completed, signed consumer application, including but not limited to, the validation code, Incentive amount, and offer expiration date;
- ii. Copy of completed, signed transfer of certificate of title of the Eligible Trade-In Vehicle;
- iii. Evidence that completed checklist of Eligible Trade-In Vehicle requirements was certified and submitted online at www.HEROS2.org;
- iv. Copy of final sales contract listing the negotiated price and the subtraction of the applicable Incentive(s) separately;
- v. Evidence that completed HEROS2 replacement incentive vehicle transfer certification was certified and submitted online at www.HEROS2.org; and
- vi. Copy of invoice(s) submitted to Foundation.

11. Indemnification and Insurance

11.1 Indemnification Dealer, its heirs and assigns, (“Indemnitor”) will indemnify, defend, and hold harmless Foundation and its directors, officers, and employees (collectively “Indemnitees”), from all losses, liabilities, claims, demands, costs, expenses, and damages, including reasonable attorneys’ fees,

resulting from, arising out of, or connected with (1) the performance of Services or omissions relating to same under this Agreement by Indemnitor, its employees, subcontractors, or any person or entity for whom Indemnitor is responsible; (2) Indemnitor's misrepresentation and/or that of its employees, subcontractors, or any person or entity for whom Indemnitor is responsible, concerning, but not limited to, the HEROS2 Program policies, procedures and processes, and/or the HEROS2 Program consumer/motorist, vehicle, and/or vendor eligibility criteria; (3) any breach of this Agreement by Indemnitor, its employees, subcontractors, or any person or entity for whom Indemnitor is responsible and/or (4) any error or negligent act or omission by Indemnitor, its employees, subcontractors, or any person or entity for whom Indemnitor is responsible. Indemnitor's duty to defend and indemnification obligations will not be limited by any assertion or finding that (a) Indemnitees are liable by reason of non-delegable duty or (b) losses were caused in part by the negligence, breach of contract, or violation of law by Indemnitees. Indemnitors will cooperate with Indemnitees in the defense of any matter and furnish Indemnitees with all related evidence in its control. Nothing in this Agreement shall constitute a waiver or limitation of any rights which Indemnitees may have under applicable law, including, without limitation, the right to implied indemnity.

11.2 Insurance Dealer shall, at the Dealer's sole cost and expense, insure its activities in connection with this Agreement, and will obtain, keep in force, and maintain, at a minimum, insurances listed below and provide to Foundation the required certificates of insurance and additional insured endorsements which identify the Foundation for California Community Colleges as certificate holders:

- i. Automobile Liability Insurance: Dealer shall maintain in effect an automobile liability insurance policy providing combined single limit bodily injury and property damage coverage of not less than one million dollars (\$1,000,000).
- ii. Commercial General Liability Coverage: Commercial general liability insurance (occurrence based) with a combined single limit of not less than \$1,000,000 per occurrence and \$2,000,000 aggregate. The policy must include the "Foundation for California Community Colleges, its officers, directors, and employees" as additional insured insofar as the operations under this Agreement are concerned.
- iii. Workers' Compensation Insurance and Employer's Liability Coverage: Workers' compensation and employer's liability coverage covering all employees as required under the Workers' Compensation and Safety Act of the State of California, as amended from time to time.
- iv. General Insurance Requirements: Dealer agrees that it has, or will, secure and maintain insurances listed above, including the additional insured endorsement, throughout the term of this Agreement. Dealer shall transmit all certificates of insurance, including the additional insured endorsement, to the appropriate Foundation contact, immediately following Dealer's execution of this Agreement.

Insurances required to be carried by Dealer pursuant to this Agreement shall be primary, and not contributory, to any insurance carried by Foundation. Coverages required will not limit any liability of

the Dealer. Insurance coverage must be in-force for the complete term of this Agreement and any extensions agreed to in writing by the parties. Dealer shall provide updates upon the request of Foundation so that Foundation may ensure that there is no break or lapse in insurance coverage during the period of contract performance. Any failure of Foundation to require Certificates of Insurance and Additional Insured endorsements shall not operate as a waiver of these requirements.

If insurance expires during the Agreement term, a new certificate of insurance and additional insured endorsement must be received by the Foundation immediately. The new insurance must meet all of the insurance requirements listed above. Dealer is responsible for any deductible or retention contained within the insurance policy or program.

12. Computer/Internet Access and Equipment Required to Support the HEROS2 Program

Dealer agrees to have and maintain, throughout the term of this Agreement, Internet access via operable computer technology and software to enable Dealer to access www.HEROS2.org and all electronic applications and data entry interfaces Foundation determines are necessary, in Foundation's sole discretion, to facilitate any activity under this Agreement. This includes, but is not limited to, software and other mediums to enable Dealer to prepare and submit required documents and other records, etc., to Foundation. Dealer agrees to maintain active email accounts at all times during the term of this Agreement and to require authorized employees to frequently check said email accounts. Dealer represents and warrants that email communications by Foundation to Dealer will be an effective and expeditious manner of communication. Dealer agrees to notify Foundation of any changes in contact information, including, but not limited to, changes in email account addresses. Dealer must also comply with the equipment and access requirements detailed in the HEROS2 Dealer Manual.

13. Non-discrimination In the performance of this Agreement, Dealer shall not discriminate in hiring, promotion, demotion, or termination practices on the basis of race, religious creed, color, national origin, ancestry, sex, age, or physical or mental disability and shall comply with the provisions of the California Fair Employment & Housing Act (Government Code Section 12900 et seq.), the Federal Civil Rights Act of 1964 (P.L. 88-352) and all amendments thereto, Executive Order No. 11246 (30 Federal Register 12319), and all administrative rules and regulations issued pursuant to said Acts and Order.

14. Representations and Warranties Dealer represents and warrants, as material terms of this Agreement, the following throughout the term of this Agreement: (1) Dealer is currently licensed to do business in California and will maintain all licenses, registrations, and permits required by federal, state, or local laws, ordinances, and/or regulations for accomplishing any Services required in connection with this Agreement; (2) Services shall be rendered in accordance with all applicable federal, state, or local laws and/or regulations pertaining to (a) consumer protection and automotive sales practices and (b) the protection of any personal information received and/or disposed of by Dealer, its employees, subcontractors, or any person or entity for whom Dealer is responsible; and (3) all personnel of Dealer associated with the HEROS2 Program will have the requisite skills, training, education, and experience to fulfill the terms of this Agreement.

15. Penalties Any Dealer personnel who violate Section 3 (Dealer Services and Consideration) and/or Section 5 (Dealer Responsibilities), as determined in Foundation's sole discretion, will result in any of the following as determined in Foundation's sole discretion: (1) Foundation reserves the right to

not reimburse Dealer for Incentives; (2) Dealer shall be immediately barred from participating in the Program and this Agreement shall be immediately terminated pursuant to Section 8.3 (Termination for Cause) above; and (3) Foundation may report Dealer's conduct to the appropriate authorities including but not limited to the Better Business Bureau, the Attorney General, and the State of California Auto Dealer's Association. These provisions shall in no way limit Foundation from pursuing any other civil and/or criminal proceedings against Dealer, including, but not limited to, civil litigation seeking full damages and restitution (including but not limited to punitive damages, liquidated damages, treble damages, etc.) and/or seeking criminal charges with any other federal, state, or local law enforcement agency.

16. Confidentiality of Consumer Information Dealer agrees to follow applicable federal, state, and local laws and regulations regarding confidentiality of consumer/motorist information including, but not limited to, personal information and data obtained or assembled by Dealer and/or any of its employees, subcontractors, or any person or entity for whom Dealer is responsible, related to performance of Services funded in part, or in total, by the HEROS2 Program. Any information or data received by Dealer in the performance of this Agreement shall not be released, published, or made available to any person or entity without prior written approval from authorized representatives of Foundation. By acceptance of this Agreement, Dealer shall adhere to all the requirements of Civil Code Section 1798, et seq., regarding the collections, maintenance, and disclosure of personal and confidential information about individuals.

17. General Terms and Conditions

17.1 Liability for Nonconforming Services Dealer will be fully responsible for ensuring that Services provided conform to the agreed upon terms under this Agreement. If nonconformity is discovered, Dealer will be given a reasonable opportunity to cure the nonconformity. If Dealer fails to cure the nonconformity within a reasonable amount of time, Foundation, in its sole discretion, may use any reasonable means to cure the nonconformity. Dealer shall be responsible for fully reimbursing Foundation for any additional expenses incurred to cure such defects.

17.2 Force Majeure Neither Foundation nor Dealer shall be liable or deemed to be in default for any delay or failure in performance under this Agreement or interruption of Services resulting, directly or indirectly, from acts of God, civil or military authority, acts of public enemy, terrorism, war, strikes, labor disputes, shortages of suitable parts, materials, labor or transportation, or any similar cause beyond the reasonable control of Foundation or Dealer.

17.3 Severability and Waiver If this Agreement is terminated or held by a court of competent jurisdiction to be invalid, illegal, or unenforceable as to particular provisions, this Agreement will remain in full force and effect as to the remaining provisions. Notwithstanding any specificity in this Agreement including but not limited to Section 11.2 (Insurance), no waiver of any breach of this Agreement will constitute a waiver of any prior, concurrent, or subsequent breach of same or any other provisions, and any waiver constituting breach of this Agreement must be in writing.

17.4 Amendments Any changes, modifications, revisions, or amendments to this Agreement must be mutually agreed upon by and between the parties to this Agreement and shall be incorporated by written instrument and effective when executed and signed by all parties to this Agreement.

17.5 Entirety of Agreement This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior and contemporaneous communications. This Agreement may be modified only by a written agreement dated subsequent to the Effective Date and signed by authorized representatives of each party.

17.6 Applicable Law The construction, interpretation, and enforcement of this Agreement shall be governed by the laws of the State of California.

17.7 Relationship of the Parties Nothing in this Agreement creates or implies the creation of a partnership, agency, or joint venture between Foundation and Dealer or that Foundation is the employer of Dealer or its employees or agents. Dealer is an independent business, in business for itself, which will perform the specific tasks pursuant to the contractual provisions of this Agreement. Dealer does not have the authority to incur any obligation, contractual, or otherwise, in the name or on behalf of Foundation.

17.8 Counterparts, Originals This Agreement may be executed in counterparts, each of which will be deemed to be an original, but all of which together shall constitute one instrument. For purposes of executing this Agreement, a document signed and transmitted via facsimile or PDF copy shall be considered as an original signature. If this Agreement is executed in counterparts, no signatory hereto shall be bound until both the parties named below have duly executed or caused to be duly executed a counterpart of this Agreement.

17.9 Notices All notices that either party may give to the other pursuant to this Agreement must be in writing and be either hand-delivered, mailed by registered or certified mail postage prepaid, return receipt requested, sent by overnight courier service, postage prepaid, or emailed to the contacts set forth below. Notice shall be deemed given on the date sent as identified on the written notification.

Foundation for California Community Colleges

Contracts Manager
Foundation for California Community Colleges
1102 Q Street, Suite 3500
Sacramento, CA 95811
Email: HEROS2@foundationccc.org
FAX: (877) 487-9559

Dealer

Please fill in all the blanks below. Use additional sheets as necessary to include all locations covered under this Agreement.

Print Name (individual authorized to sign Agreement): _____

Title: _____

Legal Business Name: _____

Doing Business As (DBA) Common Name: _____

Mailing Address: _____

City: _____, California Zip Code: _____

Business Address (if different): _____

City: _____, California Zip Code: _____

Phone Number: (_____) _____ Fax Number: (_____) _____

E-mail Address: (required) _____

THE PARTIES HEREBY EXECUTE THIS AGREEMENT:

DEALER

I certify, under penalty of perjury, under the laws of the State of California, that the following is true and correct: that I am authorized to sign this Agreement on behalf of the Dealer and that my signature below contractually binds Dealer to all terms and conditions contained herein and in the Agreement.

By: _____

Print Name: _____

Title: _____

Date: _____

**FOUNDATION FOR CALIFORNIA
COMMUNITY COLLEGES**

By: _____

Print Name: _____

Title: _____

Date: _____

By: _____

Print Name: _____

Title: _____

Date: _____